

STATE OF MICHIGAN
COURT OF APPEALS

BRAD DALBEC,

Plaintiff-Appellee,

v

ANGELA DALBEC,

Defendant-Appellant.

UNPUBLISHED

October 26, 2004

No. 255288

Gogebic Circuit Court

LC No. 02-000201-DM

Before: Murphy, P.J., and Sawyer and Markey, JJ.

PER CURIAM.

Defendant appeals as of right from the trial court's order granting plaintiff custody of the parties' two children. We affirm.

This Court has held that three standards of review apply to custody cases:

We apply three standards of review in custody cases. The great weight of the evidence standard applies to all findings of fact. A trial court's findings regarding the existence of an established custodial environment and regarding each custody factor should be affirmed unless the evidence clearly preponderates in the opposite direction. An abuse of discretion standard applies to the trial court's discretionary rulings such as custody decisions. Questions of law are reviewed for clear legal error. A trial court commits clear legal error when it incorrectly chooses, interprets, or applies the law. [*Phillips v Jordan*, 241 Mich App 17, 20; 614 NW2d 183 (2000) (citations omitted).]

“To expedite the resolution of a child custody dispute by prompt and final adjudication, all orders and judgments of the circuit court shall be affirmed on appeal unless the judge made findings of fact against the great weight of the evidence or committed a palpable abuse of discretion or a clear legal error on a major issue.” MCL 722.28.

Defendant first argues that the trial court erred in finding that an established custodial environment did not exist with her. We disagree. “Whether an established custodial environment exists is a question of fact that the trial court must address before it makes a determination regarding the child's best interests.” *Mogle v Scriver*, 241 Mich App 192, 197; 614 NW2d 696 (2000). A custodial environment is established if “over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities

of life, and parental comfort. The age of the child, the physical environment, and the inclination of the custodian and the child as to permanency of the relationship shall also be considered.” MCL 722.27(1)(c). Defendant claims that the children have been with her during most of the separation. However, during that time, custody was transferred between defendant and plaintiff several times. “[W]here there are repeated changes in physical custody and uncertainty created by an upcoming custody trial, a previously established custodial environment is destroyed and the establishment of a new one is precluded.” *Bowers v Bowers (After Remand)*, 198 Mich App 320, 326; 497 NW2d 602 (1993). Any custodial environment that had been established with defendant in this case was destroyed by the uncertainty created by shuffling the children between the parties.

Defendant also claims that the trial court erred when it granted custody of the parties’ two children to plaintiff. Again, we disagree. Custody disputes are to be resolved in the child’s best interest, as measured by the factors set forth in MCL 722.23.

Defendant challenges the trial court’s findings that factors (d), (e), and (h) are equal between the parties and challenges the trial court’s findings that factors (a), (b), (i), and (j) favored plaintiff. Defendant does not challenge the trial court’s findings that factors (c), (f), (g), and (k) weigh equally between the parties.

MCL 722.23(a) examines the “love, affection, and other emotional ties existing between the parties involved and the child.” The trial court determined that this factor slightly favored plaintiff because the children did not feel as close to defendant. After reviewing the lower court record, we cannot say that the trial court’s findings are against the great weight of the evidence.

MCL 722.23(b) examines “[t]he capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any.” MCL 722.23(b). The trial court concluded that each party had a strong capacity for love, affection, and guidance of the children. However, the court stated that the factor slightly favored plaintiff because defendant’s expressions to the children of anger toward plaintiff actually resulted in the children feeling less close to defendant. Again, after reviewing the record, we cannot say that the trial court’s findings are against the great weight of the evidence.

Regarding factors MCL 722.23(d), (e), and (h), we agree with the trial court that neither party prevailed. The trial court’s conclusion was not against the great weight of the evidence. The evidence showed that the children’s home environment had not been entirely stable or permanent, but that the children did well in school under either party’s care.

Defendant also challenges factor (i), which looks to the “reasonable preference of the child, if the court considers the child to be of sufficient age to express preference.” MCL 722.23(i). Defendant claims that the children, at five and eleven, were not of sufficient age to express a preference. However, a child of six is old enough to have their preference given some weight. *Bowers v Bowers*, 190 Mich App 51, 55-56; 475 NW2d 394 (1991). The trial court noted that it was not considering the five year old’s preference with any significance. The eleven year old expressed a preference to the counselor and to the court that he wished to live with plaintiff. Therefore, the trial court’s ruling was not against the great weight of the evidence.

Finally, defendant challenges the trial court's determination on factor (j), which examines "[t]he willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents." MCL 722.23(j). The trial court determined that this strongly favored plaintiff. Testimony at trial showed that plaintiff was precluded from talking to the children numerous times during his scheduled periods. Defendant notes that she testified that plaintiff never missed any phone calls. However, this Court defers to the trial court's determination of credibility. *Mogle, supra* at 201. The trial court's findings were not against the great weight of the evidence.

The trial court properly found that factors (a), (b), (i), and (j) favored plaintiff. We note that because there was no established custodial environment, the preponderance of the evidence standard applies. *Bowers, supra* at 324. Having reviewed the record, we conclude that the trial court did not abuse its discretion in deciding that a preponderance of the evidence established that it was in the best interest of the children to grant custody to plaintiff.

Affirmed.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Jane E. Markey